No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

On Bill of Complaint and Motion for Appointment of Special Master

REPLY IN SUPPORT OF MOTION FOR APPOINTMENT OF SPECIAL MASTER

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REPLY IN SUPPORT OF MOTION FOR APPOINTMENT OF SPECIAL MASTER

New Jersey claims the right to authorize BP p.l.c. ("BP") to construct a massive liquefied natural gas ("LNG") unloading facility on land that this Court has ruled is Delaware's, despite the fact that such construction – and the dredging necessary to permit the passage of supertanker ships the size of two football fields – undisputedly is prohibited by Delaware's uniform regulation of its coastal areas. New Jersey's claimed right to unfettered jurisdiction over Delaware's sovereign lands and to override Delaware's long-standing regulatory authority is based on an erroneous and ahistorical reading of the 1905 Compact between the two States.

Rather than consent to the appointment of a special master, a routine practice in this Court's original cases, New Jersey requests that the Court resolve this centuries-old dispute between the States this Term without any additional fact-finding, additional briefing on the merits, or consideration of the unique factual and legal issues presented first to a special master to aid in this Court's ultimate consideration of the merits. To justify its request, New Jersey disavows the notion that the only entity that benefits from such expedited treatment is BP, but New Jersey offers no excuse for denying Delaware its right to prepare and mount a defense or for departing from this Court's normal mode of resolving such controversies between two States. *See* Brief in Opposition to Delaware's Motion for Appointment of Special Master at 12 (filed Jan. 4, 2006) ("NJ Opp. Mot."). Because the reasons proffered by New Jersey are unpersuasive, this Court should appoint a special master.

I. THIS DISPUTE IS ONLY PART OF A LONG-RUNNING DISAGREEMENT BETWEEN THE STATES THAT MUST BE UNDERSTOOD IN ITS PROPER HISTORICAL CONTEXT

The 1905 Compact at issue in this case was directed primarily to fishing rights and was executed in the shadow of a long-standing boundary dispute between New Jersey and Delaware that the Compact did not resolve. Instead, this Court finally adjudicated the boundary dispute in 1934 with the help of a detailed special master's report. The Court addressed the meaning of the 1905 Compact only in rejecting New Jersey's claim that the Compact had resolved the boundary dispute in New Jersey's favor as "an argument wholly without force." *New Jersey v. Delaware*, 291 U.S. 361, 377 (1934). But the Court did not interpret the scope of Article VII of the Compact, which pertains to "riparian jurisdiction" – a term that in the contemporary legal landscape of 1905 was rarely, if ever, used and certainly was not a phrase with an accepted legal meaning.

In this action, New Jersey asserts that it has "exclusive riparian jurisdiction" over Delaware's submerged lands that abut the New Jersey shoreline within the twelve-mile circle, notwithstanding the absence of the word "exclusive" in Article VII of the 1905 Compact. To support its interpretive theory, before filing this action New Jersey spent considerable time compiling a selective evidentiary filing totaling nearly 300 pages, in addition to its detailed Petition for Supplemental Decree and Brief in Support of its Motion To Reopen and for a Supplemental Decree (filed July 28, 2005) ("NJ Br."). That New Jersey chose to initiate this litigation with what functionally was a motion for summary judgment and supporting evidence, however, does not justify bypassing this Court's normal processes in original actions – namely, the appointment of a special master.

As New Jersey acknowledges, "the matters in controversy are grave and important." *Id.* at 19. New Jersey

seeks to deprive Delaware of all jurisdiction to regulate the placement of massive bulk transfer facilities and heavy industry in a substantial part of Delaware's own territory. New Jersey has not met its heavy burden to show that time is of the essence such that Delaware should be deprived of the fair opportunity to prepare and present its case – one that any defendant has in even the most mundane federal lawsuit. Indeed, the only entity that would benefit from such expedited treatment is BP, the private entity seeking to construct the massive LNG unloading facility that would extend nearly half a mile into Delaware territory and would require the dredging of 1.24 million cubic yards of Delaware's subaqueous soil.

As Delaware has shown, however, there are ample reasons to permit the parties to continue both discovery and independent investigation of the relevant facts and law. *See* Motion for Appointment of Special Master (filed Dec. 28, 2005) ("DE Mot."). The stakes are high, as the Court's decision will likely establish for all time the jurisdiction that each State may exercise over a substantial portion of what this Court has already determined to be Delaware's sovereign territory. While Delaware shares the goal of resolving this dispute in an efficient manner, Delaware must be accorded a fair opportunity for adequate investigation of the relevant facts and historical legal principles that are essential to resolving this case. A special master should be appointed to oversee the development of the necessary record for this Court's decision.

II. PROPER RESOLUTION OF THIS CASE REQUIRES FURTHER FACTUAL INVESTIGATION, WHICH DELAWARE SHOULD BE PERMITTED TO CONDUCT UNDER THE SUPERVISION OF A SPECIAL MASTER

In its motion to appoint a special master, Delaware identified five topics on which further discovery should be taken and a fair opportunity for independent investigation accorded. *See* DE Mot. 4-9. New Jersey takes issue with those topics, but its arguments for opposing further

factual development have no merit. New Jersey's argument that Delaware should be denied a fair opportunity to discover extrinsic evidence helpful to its case is also belied by New Jersey's own reliance on the voluminous extrinsic evidence it has submitted on its own behalf.

Drafting History of the 1905 Compact. Delaware will continue seeking and expects to find additional documents, including early drafts of the 1905 Compact, correspondence between the participants in either the negotiation or adoption of the Compact, and records or accounts of public proceedings, either in state archives or in the personal papers of those involved that have been given to historical museums or other archives. Similar evidence was considered by the special master in the recent case that New Jersey brought against New York. *See* Report of the Special Master, *New Jersey v. New York*, No. 120, Orig., 1997 WL 291594, at *15 (filed Mar. 31, 1997) (considering "extrinsic evidence . . . includ[ing] the original record in the 1829-30 *New Jersey v. New York* case; . . . precompact negotiations; pre-Compact and post-Compact related jurisprudence from this Court and the courts of both States; expert testimony; and written reports").

New Jersey relies on a narrow holding by this Court that a drafter's view if not communicated to either the other commissioners or relevant State officials would likely not be reliable evidence. *See* NJ Opp. Mot. 9 (citing *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.6 (1991)). Delaware's discovery and investigation would not be thus limited. Delaware does not seek uncommunicated views of a drafter, but rather is searching for actual drafts of the 1905 Compact traded between the parties, correspondence between the commissioners and state governments, records of any public proceedings concerning the Compact, and the like. This Court has explained (in the same case on which New Jersey relies) that such evidence of a compact's negotiation history not only is admissible but can be highly relevant to determining the compact's meaning:

> We agree with the Master that it is appropriate to look to extrinsic evidence of the negotiation history of the Compact in order to interpret Article IV. We previously have pointed out that a congressionally approved compact is both a contract and a statute, and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous. Furthermore, we have on occasion looked to evidence regarding the negotiating history of other interstate compacts. Thus, resort to extrinsic evidence of the compact negotiations in this case is *entirely appropriate*.

Oklahoma v. New Mexico, 501 U.S. at 235 n.5 (emphasis added; internal citations omitted); *see also Cuyler v. Adams*, 449 U.S. 433, 447-48 (1981) (relying on compact drafters' comments on early drafts).[1]

As a matter of fundamental fairness, New Jersey cannot deprive Delaware of a full opportunity to gather its own evidence as to the drafting history of the 1905 Compact (as well as other relevant issues) in response to the evidence gathered by New Jersey. New Jersey argues unpersuasively that its plain-meaning reading of the 1905 Compact is dispositive. *See* NJ Opp. Mot. 8-9. That assertion is belied by New Jersey's repeated reliance on its own extrinsic evidence relating to the meaning of the Compact (NJ Br. 7; NJ Reply 2-3, 20[2]) and by New Jersey's acknowledgment that the Court may consider evidence beyond the four corners of the 1905 Compact if it finds that the Compact is not unambiguous. New Jersey's plain-meaning argument rests fundamentally on its claim that the Article VII phrase "may . . . continue" was in-

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[1] Even evidence that is not admissible at trial is still discoverable so long as the discovery is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

[2] Reply Brief and Supplemental Appendix in Support of Motion To Reopen and for a Supplemental Decree (filed Nov. 8, 2005) ("NJ Reply").

tended to convey new rights, and that the word "exclusive" should be impliedly read into Article VII's description of "riparian jurisdiction." NJ Opp. Mot. 11. Delaware disputes that the parties expressly or impliedly intended the allegedly plain meanings that New Jersey ascribes to those terms. Thus, New Jersey's plain-language argument quickly devolves into a discussion of history, practice, custom, and intent that rests on an evidentiary presentation. A special master would be uniquely situated to facilitate the parties' efforts to narrow the grounds for dispute on those matters.

The course of informal discovery between the parties on the expedited basis presented thus far demonstrates the need for more development of the factual record on the course of negotiations and drafting history of the 1905 Compact, among other issues.[3] New Jersey acknowledges that Delaware sought documents pertaining to the negotiation of the 1905 Compact. *See* NJ Opp. Mot. 7 & App. 5a. In discussions among counsel for each State over Delaware's discovery requests, New Jersey's representative suggested that Delaware conduct its own archival searches for documents in possession of the State of New Jersey. Delaware took that suggestion to mean that New Jersey itself had not conducted a comprehensive search of its state archives in response to Delaware's request for such documents. Indeed, New Jersey does not represent that it conducted a search of its own archives for responsive materials, but rather suggests that Delaware should be satisfied with the "principal documents" collected in

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[3] New Jersey argues that Delaware's discovery should be limited to its initial August 25, 2005 document request and a subsequent verbal request regarding any documents that New Jersey has relating to the 1877 case between the States, No. 1, Original. *See* NJ Opp. Mot. 6-7. At that time, Delaware was attempting to meet a deadline to file its papers in response to New Jersey's voluminous July 28, 2005 filings. Delaware never envisioned its single informal request as exhaustive, and Delaware further understood that New Jersey's production was limited in scope, as New Jersey did not search all files in its custody or control.

No. 11, Original, and a few other public documents. *See* NJ Opp. 8-9. But because the issues presented by New Jersey's current complaint raise issues that are different from those that have been litigated before between the two States, it is appropriate to afford both parties an adequate opportunity to search relevant archives for materials that would assist the Court in resolving the current dispute.[4]

Legal Context of the 1905 Compact. Delaware seeks fact-finding on the state of the law of waters and riparian rights as the drafters would have understood them in the years leading up to 1905, both via its own independent investigation and legal research and also by expert witnesses on water law. *See, e.g., Kansas v. Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring and dissenting in part) ("A compact is a contract. . . . It is a fundamental tenet of contract law that parties to a contract are deemed to have contracted with reference to principles of law existing at the time the contract was made.").

In view of the arcane and specialized nature of riparian law, and the fact that the relevant legal context is at least a century old, testimony by experts in water law or water rights could be helpful to the Court in determining the legal context in which this dispute must be assessed. *See, e.g., New Mexico v. General Elec. Co.*, 335 F. Supp. 2d 1266, 1305-06 (D.N.M. 2004) (finding law professor's expert testimony about the legal administrative history of the Rio Grande River and the Middle Rio Grande Basin, and the effect of the Rio Grande compact, admissible as "background or context for the determination of the pertinent factual issues"); 29 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6264, at 217-22 & n.36 (1997) ("The courts seem more open to the admission of expert legal opinions where the subject is the applica-

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[4] Delaware's searches of New Jersey's state archives are ongoing. Due to the age of the sought-after documents, such searches are both laborious and time-consuming.

tion of some complex regulatory or legal standard to a specific factual background.").

Moreover, Delaware anticipates that a water law expert would offer testimony that would inform the Court on the historical development of water law as it existed when the 1905 Compact was negotiated. Such testimony is more akin to a historical expert on legal developments. New Jersey itself submitted an affidavit purporting to set forth the historical facts of New Jersey's regulation of riparian rights in 1905. *See* NJ Br. App. 26a-28a ("Riparian Rights in New Jersey in 1905 and Today"). Delaware's request is no different in kind than the evidence New Jersey developed on its own pre-filing timetable. *See also Idaho v. United States*, 533 U.S. 262, 266 (2001) (relying on expert witness historian's account of late nineteenth century reliance by Coeur d'Alene Tribe on submerged lands under lake).[5]

The evidence Delaware seeks to develop would not in any case be limited to reports and testimony of experts but could also involve the submission of learned treatises and other materials. Delaware should be afforded time to explore these issues further, to consult expert legal historians, and to present its own evidence on issues relating to the development of the law of waters as it relates to the

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[5] The cases relied on by New Jersey (*see* Opp. Mot. 9-10) are inapposite and do not support barring expert evidence on the historical evolution and contemporary legal context of the law of waters. In *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1987), the Court agreed with the lower court's exclusion of expert opinions as to a state legislature's purpose in enacting a statute. Here, Delaware seeks only to establish the state of water law in 1905 in aid of the Court's contextual interpretation of the words of the 1905 Compact. *See also Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100-01 (1st Cir. 1997) (barring testimony on legal issues "routinely before the federal courts [and] . . . not complex," while noting that "there may be particular areas of law . . . where expert testimony on legal matters is admissible"); *Cron Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (excluding expert testimony on meaning of "lottery games" in a 1993 gaming compact); *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988) (excluding legal conclusions as to whether there had been a "search" of plaintiffs' residence).

use of the term "riparian jurisdiction" in the 1905 Compact. A special master would be best positioned to oversee the development of the historical record on the state of riparian law, to resolve any disputes in the first instance before such arguments are presented to this Court, and to make recommendations to this Court on how issues in the case should be resolved.

Tellingly, New Jersey does not dispute (because it does not address) the relevance of the state of riparian law and rights at the turn of the twentieth century. Instead, New Jersey attacks a straw man, pretending that Delaware seeks to have this Court "defer to the legal opinions offered by a party's 'expert' on the proper interpretation of a statute or the contours of American law." NJ Opp. Mot. 9. The evidence that Delaware seeks to develop and present concerns the historical facts underlying the legal background against which the terms of the 1905 Compact were drafted, which is necessary to the proper interpretation of that document.

Parties' Course of Conduct from 1905 to the Present. In its motion, Delaware pointed out the need to take discovery, including third-party discovery, of the States' course of conduct after adoption of the 1905 Compact. *See* DE Mot. 8. In opposition, New Jersey contends that Delaware should be limited to the evidence presented in No. 11, Original, such as certain "instruments that were recorded" in New Jersey's files, and Delaware's inspection of boxes produced by New Jersey in response to Delaware's initial, informal request for discovery dated August 25, 2005. NJ Opp. Mot. 10.

New Jersey, however, has relied on documents written by or on behalf of third parties, such as E.I. DuPont de Nemours & Co. ("DuPont"), in an effort to show a course of conduct consistent with New Jersey's construction of the 1905 Compact. *See* NJ Br. 32-33; *id.*, App. 102a-104a, 111a-117a. Delaware should also have an opportunity to take discovery of the third parties identified in its initial, informal August 25, 2005 discovery requests, including

DuPont, Keystone Cogeneration Systems Inc., and El Paso Eastern Company. These entities also may have evidence relevant to the States' course of conduct under the Compact that would shed light on why for several decades New Jersey acquiesced to Delaware's regulation of structures adjoining the New Jersey shore and extending into Delaware. Delaware has already commenced these third-party discovery efforts informally. A special master would facilitate the parties' efforts to obtain third-party discovery and resolve any discovery disputes that might arise between the parties themselves and between the parties and third parties.

Other course-of-performance evidence is especially relevant to Delaware's eighth affirmative defense, which asserts that New Jersey's claims are barred by the doctrines of inseverability and unenforceability. *See* Answer of State of Delaware at 12 (filed Dec. 28, 2005). The States failed to effectuate the central provision of the 1905 Compact, Article IV, which was intended to resolve the States' disputes over fishing rights and arrests on the waters through the adoption of "uniform laws to regulate the catching and taking of fish in the Delaware River and Bay." NJ Br. App. 4a; *see* DE Lodging, Tab 7, at 10 (filed Oct. 27, 2005) (Statement of Reasons) (the "main purpose" of the 1905 Compact is "to provide for enacting and enforcing a joint code of laws regulating the business of fishing in the Delaware River and Bay").

In 1991, according to one New Jersey court, New Jersey itself argued that "'the 1905 Compact has been mutually abandoned by reason of the fact that the two states have never enacted complementary fishing laws.'" Brief of the State of Delaware in Opposition to the State of New Jersey's Motion To Reopen and for a Supplemental Decree at 7 n.1 (filed Oct. 27, 2005) ("DE Opp.") (quoting *Ampro Fisheries, Inc. v. Yaskin*, 588 A.2d 879, 883 (N.J. Super. Ct. App. Div. 1991), *aff'd in part and rev'd in part on other*

grounds, 606 A.2d 1099 (N.J. 1992)).[6] A Delaware court has similarly concluded that, "[b]ecause no uniform laws ever existed in 1907, nor since, the Delaware General Assembly has never been bound by any of the provisions of the compact." App., *infra*, 6a (*State v. Mick, et al.*, Crim. Nos. 83-05-0092-93, *et al.*, slip op. at 2 (Del. Super. Ct. May 2, 1984)).

Under principles of inseverability, the States' failure to effectuate Article IV may render the entire 1905 Compact unenforceable. *See, e.g., Williams v. Standard Oil Co.*, 278 U.S. 235, 241-42 (1929) ("[T]he general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that, standing alone, legal effect can be given to it and that the Legislature intended the provision to stand, in case others included in the act and held bad should fall.") (internal quotation marks omitted); *The Federalist* No. 43, at 247 (James Madison) (C. Rossiter ed., 1961) ("A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void.").

In light of the parties' failure to effectuate Article IV, Delaware should be permitted full discovery of evidence relating to the parties' conduct in that regard following 1905, as well as the significance of Article IV generally to

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[6] The New Jersey Superior Court, Appellate Division, concluded that the 1905 Compact preempted any unilateral action by the State of New Jersey; but the New Jersey Supreme Court reversed, holding that Article IV did not require the adoption of uniform fishing laws. *See* 606 A.2d at 1103. Regardless, no state court decision can provide a controlling interpretation of the Compact. *See, e.g., West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

the parties' intent in forming the Compact. Those facts bear on whether New Jersey would have any authority to enforce Article VII even if the Court were to accept its reading of the Compact.

Status and Scope of BP's Proposed Project. In light of the recent enormous increase in the scope of BP's project in terms of its dredging of Delaware's subaqueous soil (*see* DE Mot. 9), Delaware also seeks further discovery into the extent of BP's project. New Jersey erroneously claims that this issue relates solely to whether the project "is in the public interest" as determined by the "responsible federal agencies, and New Jersey, if it prevails." NJ Opp. Mot. 11. Rather, the nature and scope of the project directly relates to whether, under the 1905 Compact, Delaware expressly conveyed to New Jersey the expansive authority that New Jersey now claims or whether, as Delaware contends, the facility is far beyond anything envisioned by the Compact, even on New Jersey's interpretation. Because "riparian jurisdiction" does not appear to have a settled meaning, whether or not a project such as BP's is reasonably encompassed within the Compact's terms is an important issue. *See Virginia v. West Virginia*, 238 U.S. 202, 233 (1915) (questions of contract interpretation may be resolved by "determination of the fair intendment of the contract itself"). New Jersey's contention that Delaware is "already fully informed" also ignores that the facts about BP's project appear to be changing on a regular basis.

New Jersey v. Delaware, No. 1, Original, filed 1877. New Jersey claims (Opp. Mot. 6-7) that Delaware has had "ample" time to compile the record in No. 1, Original, but it does not contest the crucial fact that substantial portions of the record are missing from the Court's library. Nor does New Jersey assert that it has a complete record of that case. New Jersey instead refers to an incomplete set of documents from No. 1, Original, that it sent to Delaware only six days before Delaware's brief in opposi-

tion to New Jersey's motion to reopen was due. *See id.* at 7; *id.*, Ex. A, Supp. App. 8a-9a.

By letter dated November 30, 2005, New Jersey effectively conceded that its records were incomplete by requesting that Delaware "kindly forward to us any documents on behalf of Delaware in New Jersey v. Delaware I." App., *infra*, 4a (Letter from Peter C. Harvey, New Jersey Attorney General, to Ryan P. Newell, Connolly Bove Lodge & Hutz LLP (Nov. 30, 2005)). In light of the historic nature and importance of this dispute, Delaware should be permitted to continue to search for the complete record of No. 1, Original, which informed the drafters' understanding of the issues to be addressed as they negotiated a settlement of that case through the 1905 Compact. Indeed, as Delaware has noted, New Jersey currently asserts a far more extensive scope of jurisdiction under the 1905 Compact than it did in the litigation that the Compact resolved. *See* DE Mot. 7. Delaware should be permitted to explore further the extent to which New Jersey's changing positions should inform the meaning of the 1905 Compact.

New Jersey's Interpretation of the 1905 Compact Suffers From Significant Flaws. As Delaware has pointed out (*see generally* Opp. 35-75), New Jersey's reading requires engrafting the word "exclusive" onto Article VII when in fact the commissioners – who used that term elsewhere in the 1905 Compact – avoided it with respect to Article VII. And, while the commissioners incorporated verbatim other language from New Jersey's 1834 Compact with New York, New Jersey's commissioners did not propose – or were unable to obtain – language that would have granted New Jersey "exclusive" jurisdiction of the nature sought by New Jersey here.

New Jersey's reading of Article VII is likewise inconsistent both with the 1905 Compact as a whole and with the extrinsic evidence found thus far. The key provisions of the Compact, in Articles I through V, were intended to resolve the disputes over fishing rights and arrests on the

water that had caused the litigation that the parties sought to settle. *See* NJ Br. App. 2a-5a. Article VI makes clear that the Compact does not grant rights affecting the oyster industry. *See id.* at 5a. Article VII similarly permits each State to "continue to exercise riparian jurisdiction" "on its own side of the river" without expressly conveying new rights on the other side of the territorial boundary between the States. *Id.* Article VIII then reserves Delaware's right to vindicate its claim to full sovereignty up to the low-water mark on the New Jersey shore, thus determining the line separating each State's "own side of the river" for purposes of Article VII. *Id.*

Finally, even if Article VII could be construed as an express relinquishment of Delaware sovereignty, New Jersey's expansive assertion of "exclusive riparian jurisdiction" fails because it mistakes a reference to a narrow type of jurisdiction, "riparian jurisdiction," for a broad grant of exclusive sovereignty over any issue related in any way to a riparian right.

Full discovery should be permitted, under the guidance of a special master, on these and other important issues that may arise in the course of litigation. To the extent New Jersey is concerned about needless delay or expenses, a special master would be fully empowered to streamline the proceeding and avoid any waste or delay, while at the same time granting Delaware full and fair discovery, as well as an adequate opportunity to search public and private archives, museums, private collections, corporate records, and other sources for relevant documents in this historic dispute.

III. THIS COURT'S CASES FAVOR APPOINTMENT OF A SPECIAL MASTER

As New Jersey acknowledges, "it is true that the Court frequently appoints a special master in original actions." NJ Opp. Mot. 2. New Jersey thus concedes it is the norm, and in fact this Court has appointed a special master in an overwhelming majority of original actions. *See, e.g.*, *Kansas v. Colorado*, 543 U.S. 86 (2004); *Virginia v. Mary-*

land, 540 U.S. 56 (2003); *New Jersey v. New York*, 523 U.S. 767 (1998); DE Mot. 5. New Jersey nevertheless opposes the appointment of a special master, relying first on two inapposite cases in which this Court has declined to appoint one. *See* NJ Opp. Mot. 2-3.

In *United States v. Texas*, 339 U.S. 707 (1950), the Court applied its own controlling precedent on the "equal footing" doctrine to determine the scope of Texas's sovereignty over coastal waters upon its admission as a State of the Union. *See* NJ Opp. Mot. 2 ("the Court had decided similar cases in favor of the United States").[7] The equal-footing doctrine has no applicability here, however, and there is no controlling precedent to apply because this Court has not interpreted the relevant provisions of the 1905 Compact.

Moreover, the Court in *United States v. Texas* made clear that, "[i]f there were a dispute as to the meaning of documents and the answer was to be found in diplomatic correspondence, contemporary construction, usage, international law and the like, introduction of evidence and a full hearing would be essential." 339 U.S. at 715. That reasoning supports appointment of a special master here, because interpretation of the 1905 Compact will be informed by "contemporary construction" and "usage" of the terms the drafters used pertaining to riparian laws and rights. *See id.* ("The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts.").

In the other case on which New Jersey relies, the Court resolved a boundary dispute based on judicial estoppel without appointing a special master. *See New Hampshire v. Maine*, 532 U.S. 742 (2001). But that resolution came

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[7] The Court explained that the "equal footing clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded . . . . There is no need to take evidence to establish that meaning of equal footing." *United States v. Texas*, 339 U.S. at 715-20.

about from a recommendation of the United States that this Court's precedent would resolve the issue in such an efficient manner. *See* U.S. Br. at 14-15, No. 130, Orig. (filed Dec. 19, 2000). As Delaware has explained, that doctrine is inapplicable here for multiple reasons – the most significant being that this Court never relied on the statements of Delaware's outside counsel in the boundary case on which New Jersey relies and which New Jersey in any event misinterprets. *See* DE Opp. 68-72 & n.38.[8] New Jersey did not attempt to refute Delaware's arguments on this issue in its subsequent reply brief. *See* NJ Reply 23.[9]

New Jersey next concedes that its original filing was functionally a motion for summary judgment and asserts that "New Jersey's request for relief, like a case for summary judgment, presents no disputes of material fact and can be resolved as a matter of law." NJ Opp. Mot. 4. Although New Jersey claims that "[s]ummary judgment motions are proper and not uncommon in original action cases," *id.*, it fails to cite a single case for the proposition that summary judgment is proper where the opportunity for discovery and independent investigation of facts has been denied. In *United States v. Alaska*, 503 U.S. 569 (1992), the dispute turned on the proper interpretation of a federal statute and the administering agency's construction of it, issues that rarely, if ever, would require factual

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[8] New Jersey's original filing did not mention judicial estoppel or cite *New Hampshire v. Maine*, but rather relied on the statements as course-of-performance evidence of the meaning of the 1905 Compact. *See* NJ Br. 27-30. Delaware fully refuted New Jersey's reading and, in an abundance of caution, explained why any claim of judicial estoppel would fail as well.

[9] New Jersey also cites *Ohio v. Kentucky*, 410 U.S. 641 (1973), *see* NJ Opp. Mot. 1-2, but in that case the Court *had* appointed a special master. *See* 410 U.S. at 643-44 *id.* at 652 (rejecting proposed amended complaint based on 150-year-old controlling precedents and "remand[ing] to the Special Master for further proceedings" on allegations in original complaint); *opinion following remand*, 444 U.S. 335, 337 (1980) ("We agree with the special master.").

development. Likewise, *California v. United States*, 457 U.S. 273, 278 (1982), involved a narrow "choice-of-law issue," as to which this Court found that "[n]o essential facts [were] in dispute." And in *Nebraska v. Wyoming*, 507 U.S. 584 (1993), the Court resolved a water-rights dispute on cross-motions for summary judgment by interpreting an equitable apportionment decree that it had issued in 1945; but it did so only after full discovery, and the Court found the report of the special master to be of substantial assistance in its consideration and disposition of that case. *See id.* at 593 ("To the extent that we agree with the Master, we have found it unnecessary to repeat in detail his careful evaluation of the voluminous evidence.").[10] In any event, this case simply does not present the kinds of unusual circumstances in which this Court has exercised its discretion not to appoint a special master in resolving a dispute between two States.

IV. THE COURT'S USE OF A SPECIAL MASTER IN *VIRGINIA V. MARYLAND* SUPPORTS THE APPOINTMENT OF A SPECIAL MASTER HERE

New Jersey's claim that a special master is purportedly "unnecessary" because *Virginia v. Maryland*, 540 U.S. 56 (2003), provides sufficient "legal guidance" (NJ Opp. Mot. 13) fails to acknowledge that the Court afforded both States in that case a full opportunity to develop the record and employed the assistance of a special master. New Jersey's argument also ignores significant differences in the language of the 1905 Compact, the historical background surrounding the Compact, and the course of conduct between the States. Those issues thus raise factual

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[10] New Jersey also relies (Opp. Mot. 4-5) on *Keebler Co. v. Murray Baking Products*, 866 F.2d 1386 (Fed. Cir. 1989), but there the court affirmed an agency decision granting summary judgment and denying discovery where the non-movant asserted only that it sought "certain information and other evidence." *Id.* at 1389. Delaware's asserted need for the opportunity for discovery and independent investigation is much more specific and involves inquiry into century-old events. *See* DE Mot. 6-9; *supra* Part II.

and legal issues distinct from those considered in *Virginia v. Maryland*.

In *Virginia v. Maryland*, the Court had before it two interstate compacts, the 1785 Compact and the 1877 Black-Jenkins Award, that were approved by both States and by Congress pursuant to the Compact Clause. *See* 540 U.S. at 63. Moreover, the Black-Jenkins Award itself had expressly spoken to issues of "riparian ownership" under the 1785 Compact, and this Court also was able to consider the "reasoning contained in the Black-Jenkins opinion." *Id.* at 63, 71. Despite the availability of those legal sources, the Court still appointed a special master, who reviewed submission of 25 volumes of historical documents, correspondence, and secondary source material, as well as affidavits from experts on the history surrounding the 1785 Compact and the 1877 Black-Jenkins Award. After considering all of that evidence, the special master issued a 97-page report on December 9, 2002.[11]

Moreover, the special master's report aided the Court in several respects. First, the report narrowed the issues for presentation to the Court by limiting the consideration of the case to "Maryland's attempt to regulate construction in and water withdrawal from the Potomac by Virginia and its citizens." *Virginia v. Maryland*, Report at 10. The special master interpreted the 1785 Virginia-Maryland Compact and analyzed submissions relating to the historical review of the negotiation and events surrounding the adoption of the 1785 Compact. The special master also performed a thorough review of events and agreements that occurred subsequent to the adoption of the 1785 Compact (including the Black-Jenkins Award) and made recommendations relating to Maryland's prescrip-

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[11] *See* Report of the Special Master, *Virginia v. Maryland*, No. 129, Orig. (filed Dec. 9, 2002) ("*Virginia v. Maryland*, Report"). A copy of the special master's report in *Virginia v. Maryland*, which is unreported, can be found on the Virginia Attorney General's website, http://www.oag.state.va.us/PDF_files/master_Report.pdf

tion defense based upon a review of the evidence submitted.[12]

Delaware should be given the same opportunity to develop the facts relating to the issues raised in this case as the parties were afforded in *Virginia v. Maryland*, particularly because this case has no analog to the Black-Jenkins Award or the opinion supporting that award. Here, as discussed above, a special master would oversee the gathering of evidence relating to the drafting history of the 1905 Compact, which may be critical to resolving disputed issues of fact over the proper interpretation of the Compact. Moreover, a special master would review the legal context of the 1905 Compact and investigate the meaning of "riparian jurisdiction" as it existed at the time of the drafting of the Compact. The special master would make recommendations regarding the drafters' intent on Delaware's regulatory authority in light of the ongoing boundary dispute between the parties at the time of the adoption of the 1905 Compact and the unique provisions in the Compact that preserve the rights and jurisdiction of each State of, in, and over the Delaware River except as expressly set forth therein. The special master would review the parties' course of conduct after 1905 as that bears on the meaning of the Compact and any affirmative defenses, and assist the Court in reviewing the status and scope of BP's proposed project and whether New Jersey's assertion of exclusive jurisdiction over Delaware lands is improper.

Although the use of a special master in *Virginia v. Maryland* supports Delaware's request for similar treatment here, the decision in *Virginia v. Maryland* does not dictate the result in this case or address the unique factual, historical, and legal issues surrounding this dispute. Article VII of the 1905 Compact provides that each State may "continue to exercise" riparian jurisdiction on its "own side of the river." NJ Br. App. 5a. The 1905 Com-

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[12] All exceptions to the special master's report were overruled by this Court's final opinion. *See Virginia v. Maryland*, 540 U.S. at 79.

pact did not expressly grant the States the right to wharf out and for the States to have "full property in the shores . . . adjoining their lands," as the 1785 Compact provided. *See Virginia v. Maryland*, 540 U.S. at 62. The 1905 Compact also contains an express reservation of jurisdiction (Article VIII, *see* NJ Br. App. 5a) not contained within the 1785 Compact. In addition, the Court in *Virginia v. Maryland* interpreted the 1785 Compact in light of all the provisions thereof bearing on the issue of retained regulatory authority. *See* 540 U.S. at 66-67. The Court's interpretation of the 1785 Compact is not simply transferrable to the very different provisions of the 1905 Compact.

Another critical distinction between the *Virginia v. Maryland* case and this action is the scope of the relief sought. As the special master in *Virginia v. Maryland* stated in his report:

> This case is limited to consideration of Maryland's attempt to regulate construction in and water withdrawal from the Potomac by Virginia and its citizens. That is all that either Virginia's Complaint or the factual context of this case puts in controversy. Whether Maryland has the right to regulate Virginia's other activities in and on improvements constructed by Virginia or its residents below the low-water mark on the Virginia shore through imposition and collection of taxes, enactment and enforcement of criminal laws or other general licensing laws relating to public safety, occupational safety, health, alcohol, gambling, hunting or fishing, or general entertainment licensing, including restaurant inspection, is not at issue in this litigation.

Virginia v. Maryland, Report at 10. Here, by contrast, New Jersey seeks far broader relief barring Delaware from exercising most if not all sovereignty relating to any structure linked to New Jersey's allegedly exclusive riparian jurisdiction. Even if Article VII of the 1905 Compact had granted New Jersey new rights relating to riparian

jurisdiction (and it did not), Article VII may not be read so expansively as to preclude Delaware from regulating based upon environmental, conservation, or police power concerns, including Delaware's denial of a permit to BP under its Coastal Zone Act. Delaware law would govern activities that occur on a structure within its territory, as Virginia conceded with respect to its dispute with Maryland.[13] Also, the massive intrusion onto Delaware territory planned by BP is far more significant than the water pipe at issue in *Virginia v. Maryland*.

CONCLUSION

For the foregoing reasons and those stated in Delaware's motion, the Court should grant Delaware's motion for appointment of a special master. If the Court declines to appoint a special master, however, Delaware respectfully requests that the Court set the matter for briefing in the normal course.[14]

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[13] Counsel for Virginia conceded at oral argument in the *Virginia v. Maryland* case that the right to wharf out does not include the right to conduct any activity. "Operating a casino on the pier would not be a riparian use, and that's why Virginia has not objected to a wide variety of activities by Maryland on its side of the line that don't go to whether Virginia has the right to build the riparian structure in the first place." Oral Arg. Tr. at 48, *Virginia v. Maryland*, No. 129, Orig., 2003 WL 22335915, at *48 (Oct. 7, 2003).

[14] While previously acknowledging that further briefing on the merits would be not only warranted but desirable (*see* NJ Reply 28 ("The Case Should Be Briefed And Argued This Term"); *id.* at 30 (requesting that the Court "set a briefing schedule")), New Jersey now requests that this matter simply "proceed to argument and decision this term," presumably on the existing briefs. NJ Opp. Mot. 18. Delaware strongly objects to the course newly proposed by New Jersey, which not only would deny Delaware a fair opportunity to gather evidence by both formal discovery and independent investigation, but also would exclude the evidence and legal materials Delaware has been able to compile since filing its opposition to New Jersey's initial filing.

Respectfully submitted.

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January 17, 2006

APPENDIX

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[SEAL OMITTTED]

M. JANE BRADY
ATTORNEY GENERAL

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

[Addresses/Phone Numbers Omitted]

PLEASE REPLY TO: New Castle County

August 4, 2005

By Federal Express

Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
One First Street, NE
Washington, DC 20543

Re: The State of New Jersey v. The State of Delaware
Case No. 11, Original

Dear Mr. Suter:

This office represents the defendant, the State of Delaware, in the above matter. On behalf of the State of Delaware, we respectfully request an extension of 60 days to respond to Plaintiff's Motion to Reopen and for a Supplemental Decree ("Plaintiff's Motion") and its brief in support thereof. Plaintiff's Motion was docketed on August 1, 2005; consequently, the brief in opposition must currently be filed on or before August 11, 2005. For the reasons set forth below, the State of Delaware is respectfully requesting an extension until October 10, 2005, to file its opposing brief.

The State of Delaware is currently in the process of retaining Supreme Court counsel. In addition, due to certain scheduling conflicts related to upcoming vacations for outside counsel and key individuals employed by the State of Delaware, including potential affiants, counsel

will need additional time to prepare a response that adequately and properly addresses the legal and factual issues raised in Plaintiff's Motion and brief.

By way of background, the substantive issues related to the matters in dispute were only presented to the State of Delaware in one exchange of letters and brief telephone calls prior to this filing. Other than these cursory exchanges, there had been no other prior substantive discussions between the States of Delaware and New Jersey about the Compact of 1905 and the jurisdiction of Delaware and New Jersey. In fact, representatives of the State of Delaware were informed only days before Plaintiff's Motion was filed that the State of New Jersey was planning on filing such a Motion, and were unaware of the extent of the filing. Specifically, the State of Delaware was unaware that the State of New Jersey had requested and received permission to file a separate brief under Supreme Court Rule 21.1.

While there has been recent litigation in Delaware concerning permits to use Delaware's lands, that litigation did not involve the State of New Jersey or the Compact of 1905 between the States. Previously, Delaware's Department of Natural Resources and Environmental Control was involved in a dispute with Crown Landing LLC, a wholly owned subsidiary of British Petroleum, p.l.c., about whether Crown Landing LLC's proposed liquefied natural gas facility (which is located in Delaware waters) was a "permitted use" under Delaware's Coastal Zone Act. While the case was decided by the Coastal Zone Industrial Control Board (filed on February 15, 2005 and decided on April 8, 2005), that Board did not address any issues related to the Compact of 1905, and the Board's decision did not address issues related to riparian rights.

Moreover, the preparation of a response to Plaintiff's Motion and brief will require a significant amount of factual investigation. The State of New Jersey has submitted a brief that has seven affidavits, some with multiple

exhibits including historic documents covering the past 75 years. Given the threshold issues that exist about whether the Supreme Court should grant the motion, and the wide range of factual issues that the State of New Jersey has raised in its motion, the State of Delaware will need to do a detailed search of historic records. In addition, the State of Delaware may need to submit multiple affidavits supporting its position, and all of this would result in a significant hardship to accomplish those tasks in the very near future.

By copy of this letter, we are concurrently informing Plaintiff's counsel of our request. Thank you for your courtesy and prompt consideration of this request.

Very truly yours,

/s/ M. JANE BRADY

M. Jane Brady
Attorney General

MJB:mah

CC: Rachel J. Horowitz, Deputy Attorney General of New Jersey

[SEAL OMITTED]

RICHARD J. CODEY
Acting Governor

PETER C. HARVEY
Attorney General

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
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November 30, 2005

Via Overnight Mail

Ryan P. Newell, Esq.
Connolly Bove Lodge & Hutz LLP
The Nemours Building
1007 North Orange Street
PO Box 2207
Wilmington, Delaware 19801

Re: State of New Jersey v. State of Delaware

Dear Mr. Newell:

Enclosed please find a CD containing a cleaner version of the Record and Transcript of New Jersey v. Delaware I. The enclosed CD contains the three (3) volumes and Record.

Furthermore, kindly forward to us any documents on behalf of Delaware in New Jersey v. Delaware I.

Sincerely yours,

PETER C. HARVEY

ATTORNEY GENERAL
OF NEW JERSEY

By: */s/* JULIE K. GOLDMAN
Julie K. Goldman
Attorney Assistant

SUPERIOR COURT
OF THE
STATE OF DELAWARE

Claud L. Tease
Judge

Court House
Georgetown, DE 19947

May 2, 1984

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RE: State v. Mick, Parsons, Crow and Willey
83-05-0092-93, 0094-95, 0081-0091
0071-0080, 1080, 2080, 3080, 1091,
2091, 3091

Gentlemen and Madam:

The parties do not dispute the fact that in 1905 Delaware and New Jersey entered into an interstate compact relating to disputes over territory, jurisdiction, and the taking and catching of fish in the Delaware River and Bay.

The compact authorized the passage of uniform laws by the states but did not require them to be passed.

In 1907, contrary to the position taken by defendants, the states did not enact uniform laws pursuant to the compact and this lack of uniformity is obvious from an examination of the pertinent provisions of the 1907 legislation.

Consequently, the various laws regulating the taking of fish, enacted by the Delaware General Assembly between 1907 and today, are valid and enforceable.

Aside from the obvious substantive differences in the content of the 1907 Delaware and New Jersey statutes, historians, individuals, organizations and legal advisors have consistently agreed over the years that the 1907 laws were not uniform in many important respects.

Since the provisions of Article IV of the compact, authorizing the states to pass uniform laws, were never put into effect, the states have been free to enact their own legislation regulating the fishing in the bay and ocean.

An excellent in-depth review of this question is found in the State's answering brief filed on September 7, 1983, pp. 16-35.

Defendant's argument relating to the 1915 Delaware Code "revisions" is without merit because the changes were simply proposed, and New Jersey had then, and has since had, its own statutes dealing with the taking of fish, different in substance from Delaware's.

Because no uniform laws ever existed in 1907, nor since, the Delaware General Assembly has never been bound by any of the provisions of the compact.

* * * * * *

Defendants challenge the pertinent statutes on the ground of vagueness and the consequent failure to give notice as to what type of conduct is prohibited. Such challenges must be examined in the light of the facts of the particular case at hand. U.S. v. Maguire, 419 U.S. 544 (1975); Upshur v. State, Del. Supr., 420 A.2d 165 (1980).

(There are no First Amendment rights raised by defendants.)

It is abundantly clear from the facts of record in these cases that defendants knew what type of conduct would be considered unlawful under 7 Del. C. §910 and 936.

* * * * * *

I find no inconsistencies in Chapter 9 of 7 Del. C. sufficient to support a constitutional attack on any of the sections of that chapter. When read and analyzed together they are reasonably clear and consistent.

A comprehensive resources management plan, whether put into effect by statute or regulation enacted pursuant to statute, is necessarily suspect and subject by its very nature to arguments relating to vagueness and inconsistency; but the administrators and the courts must be slow to throw them aside because of the importance of resources management to society, absent a clear showing of inconsistency.

* * * * *

The question raised by the parties regarding the duty of the Delaware General Assembly to modernize the fin fishing laws has been recently mooted. The duty of the courts, in most cases, is to interpret the law without regard to whether it comports with good public policy. And if a statute is antiquated or may produce a hardship to a special class of persons or may lead to an unwise result, it is for the legislative branch of government to act, not the judicial branch.

* * * * *

Defendants' non-enforcement argument has previously been disposed of by the Delaware Court of Chancery in Delaware Watermen's Assoc. v. DNREC, et al., C.A. 789 (1983), Kent County, Brown, Chancellor.

For the reasons set out herein the defendants' motions to dismiss must be, and they are hereby, denied.

Sincerely yours,

/s/ CLAUD L. TEASE
Claud L. Tease

CLT:Hf
cc: Prothonotary
Case Scheduling Office